Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

DATE: May 27, 1998
CASE NO: 97-INA-479

In the Matter of:

JOSE L. MACIAS
Employer

On Behalf of:

ANA BERTHA FLORES
Alien

Appearance: Ruben E. Hernandez
Santa Ana, CA
For the Employer and Alien

Before: Holmes, Vittone, and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212(a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United

States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties.

Statement of the Case

On June 1, 1994, Jose L. Macias ("employer") filed an application for labor certification to enable Ana Bertha Flores ("alien") to fill the position of Domestic Cook at an hourly wage of $12.20 (AF 10). The job duties are described as follows:

> The occupant of this position will be required to cook, season and prepare a variety of meat, fish, chicken dishes, soups, according to my instructions. Will be required to plan menu and order foodstuffs. Will serve meals to family of 5 and guests for both lunch and dinner for the above five days. Will also be required to clean up the kitchen and pots and pans after the meals are over.

The job requirements are two years of experience in the job offered, with verifiable personal references (AF 10).

On April 19, 1996, the CO issued a Notice of Findings proposing to deny the labor certification. The CO cited a violation of §656.24(2)(ii) which provides that the CO shall consider a U.S. worker able and qualified for the job opportunity if the worker by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. Based on a review of their resumes, the CO determined that the following applicants were qualified for the position: Vincenzo Mazzilli, Rami Afriat, Ranato Rosal. As a result, the CO concluded that the employer provided other than lawful, job-related reasons for rejecting several applicants, in violation of §656.21(b)(6).

In rebuttal, dated May 10, 1996, the employer argued that none of these applicants met the requirement of two years of experience as a domestic cook. The employer stated that the CO previously found that an alien was not qualified for the position of domestic cook, even though he possessed two years of experience as a restaurant cook. He further pointed out that the three applicants had no experience as domestic cooks (AF 6).

The CO issued the Final Determination on June 25, 1996 denying the labor certification. The CO found that the employer's rebuttal did not provide sufficient evidence to indicate that a good faith recruitment effort was conducted. The CO therefore concluded that U.S. workers were rejected for other than lawful, job related reasons (AF 3). On July 29, 1996, the employer

[1] All further references to documents contained in the Appeal File will be noted as "AF."

requested administrative review of denial of labor certification (AF 1).

Discussion

The issue presented by this appeal is whether the employer recruited U.S. applicants in good faith which is required by § 656.21 (b) (6) and § 656.24 (2) (ii) of the regulations.

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. §656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. §656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of a good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1.

Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he or she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. *Nancy, Ltd.*, 88-INA-358 (Apr. 27, 1989) (*en banc*), rev'd *Nancy Ltd. v. Dole*, Case No. 89-2257-CIV-Scott (S.D. Fla. Aug. 8, 1990) (adopting Magistrate's recommendation). In *Gorchev & Gorchev Graphic Design*, 89-INA-118 (Nov. 29, 1990) (*en ban*), the Board found that although *Nancy* was reversed by the United States District Court for the Southern District of Florida, the Court did not address the validity of the policy guideline stated in *Nancy*. Thus, the Board reaffirmed the principle that seemingly qualified applicants' credentials must be investigated (by an interview or otherwise) to determine whether the applicant meets all of the requirements.

In this case, the CO determined that based on previous work experience, Applicants Mazzilli, Afriat, and Rosal were qualified to perform the duties of the offered position. Despite their alleged qualification, the record reveals that none of these applicants were directly contacted by the employer. Mr. Afriat, who has more than ten years of experience as a cook, stated that he was never contacted by the employer (AF 18). Mr. Afriat's resume reveals that he possesses cook experience in a private home and several boarding homes. Similarly, Mr. Rosal worked as a cook for ten years in a boarding home. However, Mr. Rosal reported that he was not contacted by the employer (AF 24). The same is true for Mr. Mazzilli who has extensive experience as a private household cook (AF 28-29). Based on the foregoing, we conclude that the employer failed to document that he recruited U.S. workers in good faith. Accordingly, certification was

properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and,**(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.